In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1042

BETHLEHEM STEEL CORPORATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Bethlehem Steel Corporation, petitioner herein, prays for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is not yet officially reported, and is reproduced as Appendix A. The opinion of the Commonwealth Court of Pennsylvania is reported at 23 Pa. Cmwlth. Ct. 387, 352 A.2d 563 (1976) and is reproduced as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on November 24, 1976. A timely application for reargument was filed by petitioner on December 8, 1976 and was denied by the Supreme Court of Pennsylvania on January 3, 1977. (Appendix C) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED FOR REVIEW

Whether the subjection of petitioner to simultaneous state court proceedings to enforce an administrative order at the very time that proceedings to modify the order are pending in the administrative process, in accordance with the express terms of the order, violates petitioner's Fourteenth Amendment right to due process of law when enforcement of the unmodified order will require petitioner to take costly and irrevocable action which could be rendered moot by modification of the order in the administrative process.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The relevant provision of the United States Constitution is reproduced as Appendix D.

Section 10(a) of the Pennsylvania Air Pollution Control Act, 35 P.S. §4010(a), is reproduced as Appendix E.

STATEMENT OF THE CASE

In this action the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), purported to invoke the subject matter jurisdiction of the Commonwealth Court of Pennsylvania by filing in that Court a petition for enforcement of an administrative order concerning the operation of petitioner's by-product coke ovens in Bethlehem and Johnstown, Pennsylvania. In its petition, the DER premised the jurisdiction of the Commonwealth Court on Section 10(a) of the PENNSYLVANIA AIR POLLUTION CONTROL ACT, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4010(a) (the "Act").

Bethlehem filed preliminary objections to the DER's petition. In summary, the objections urged dismissal of the petition on the grounds that Section 10(a) of the Act confers

subject matter jurisdiction on the Commonwealth Court only over final orders of the DER from which no timely appeal has been taken or which have been sustained on appeal; that the administrative order in question was not a final order of the DER subject to enforcement under Section 10(a); that extensive proceedings to modify the abatement plans under the order, in accordance with its clear, specific and unambiguous language, are pending before the Pennsylvania Environmental Hearing Board ("EHB") from which an appeal may thereafter be taken to the Commonwealth Court; and that the DER's attempt to invoke the jurisdiction of the Commonwealth Court under Section 10(a) of the Act is not authorized by that Section and constitutes a deliberate attempt to subject Bethlehem to simultaneous proceedings in separate forums. Inherent and implicit in Bethlehem's preliminary objections is Bethlehem's contention that failure to dismiss the petition would violate Bethlehem's constitutional right to due process of law.

The following is a detailed summary of the proceedings which have given rise to this petition.

1. Following lengthy negotiations between the DER and petitioner, the parties executed Air Pollution Abatement Order No. 72-533 on February 25, 1972 concerning the emissions at petitioner's Coke Oven Batteries in Johnstown and Bethlehem, Pennsylvania.

2. Order No. 72-533, as implemented by petitioner's DER-Approved Air Pollution Abatement Plans of June 29, 1973, contemplated, among other things, that Franklin Coke Oven Battery No. 17 at the Johnstown Plant would be taken out of operation by May 31, 1975 and that petitioner would submit an application for a permit to construct equipment to control pushing emissions at Coke Oven Battery No. 5 at the Bethlehem Plant by March 1, 1975.

3. In recognition that the order was one of the first of its kind, that the air pollution control measures required to attain the final standard thereunder were untried and unproven, and that the order might require modification, paragraph 9 thereof expressly granted to petitioner the right to apply to the DER for modification of its provisions and of the plans and schedules submitted and approved thereunder. Paragraph 9 further granted petitioner the right to appeal any order, decision or other action of the DER thereon to the EHB and to the Courts of the Commonwealth of Pennsylvania.[1]

4. Acting pursuant to paragraph 9 of Order No. 72-533, on September 17, 1973 petitioner submitted an application for amendment of the Air Pollution Abatement Plan applicable to Franklin Coke Oven Battery No. 17 at the Johnstown Plant. Petitioner's request was formally denied by the DER on February 18, 1975 and, again acting pursuant to the terms of paragraph 9 of Order No. 72-533, petitioner filed a timely appeal from that denial.

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[1]Paragraph 9 of the order provides as follows:

"9. Upon application of Bethlehem Steel Corporation the provisions of this order, and plans and schedules submitted and approved hereunder, may be modified by the Department, when

"A. delivery or installation of equipment is delayed by events not in the control of Bethlehem Steel Corporation;

"B. revision of the plans and schedules submitted or approved is necessary to incorporate changes in technology or corporate planning to achieve within the time specified in paragraph 5 hereof, significant improvement in air pollution control; or

"C. air pollution control standards applicable to the by-product, slot-type coke ovens are changed.

"Any order, decision or other action taken by the Department upon such application may be appealed to the Environmental Hearing Board and the courts of the Commonwealth as provided by law."

5. With respect to the Coke Oven Batteries at its plant in Bethlehem, Pennsylvania, petitioner's original Air Pollution Abatement Plan of June 29, 1973 provided, in part, that an application for a permit to construct equipment to control pushing emissions at Coke Oven Battery No. 5 would be submitted to the DER by March 1, 1975.

6. After further negotiations, by letter dated May 13, 1975 which was delivered to the DER on May 15, 1975, petitioner submitted to the DER proposed modifications of its original Air Pollution Abatement Plan for the Coke Oven Batteries at the Johnstown and Bethlehem Plants. In essence, these proposed modifications contemplated continued operation of the Coke Oven Batteries at both plants with proposed pollution control systems.

7. By letters dated June 16, 1975, the DER denied petitioner's request for modification of the Abatement Plans for the Franklin and Bethlehem Coke Oven Batteries. On June 27, 1975, pursuant to paragraph 9 of Order No. 72-533, petitioner filed timely appeals from those denials to the EHB. The appeal concerning the proposed amendment to the Air Pollution Abatement Plan for the Bethlehem Plant is pending at EHB Docket No. 75-154-D and the appeal concerning the Franklin Batteries is pending at EHB Docket No. 75-155-D.

8. Notwithstanding the pendency of those proceedings before the EHB, on or about July 25, 1975 the DER filed a petition to enforce Order No. 72-533 in the Commonwealth Court. Petitioner filed preliminary objections to the DER's petition on jurisdictional and other grounds.

9. On February 18, 1976 the Commonwealth Court filed an opinion and order overruling petitioner's preliminary objections but noting that the case presented an unusual situation of potential conflict between the Court and the EHB (Appendix B).

10. An appeal was taken to the Supreme Court of Pennsylvania from the Commonwealth Court's February 18, 1976 order. Petitioner again argued that the Commonwealth Court was without jurisdiction over the proceeding filed by the DER pending resolution of appeals filed pursuant to the very orders sought to be enforced.

11. On November 24, 1976, the Supreme Court issued an opinion and order affirming the decision of the Commonwealth Court (Appendix A). On December 8, 1976, petitioner filed an application for reargument which was denied by the Court on January 3, 1977.

REASONS FOR GRANTING THE WRIT

The instant proceeding is an important one because it involves the extent to which a state may subject a defendant to the burden of an enforcement action with attendant costs and the potential for an irrevocable loss while the very order sought to be enforced is the subject of an appeal taken in accordance with its express terms. Petitioner and the DER agreed to the terms of the consent order which, in paragraph 9 thereof, expressly permits the appeal of a denial by the DER of an application for modification. Having so agreed, the State denied petitioner due process by attempting to enforce against petitioner an order requiring substantial irrevocable action during the pendency of proceedings in the administrative process which the DER acknowledges may result in the modification of that order.

Due process is denied where the procedure enforced by a state tends to shock the sense of fair play. *Galvan v. Press*, 347 U.S. 522, *reh. denied*, 348 U.S. 852 (1954); *Howard v. United States*, 372 F.2d 294 (9th Cir. 1967), *cert. denied*, 388 U.S. 915 (1967). This rule is uniquely applicable to this case where, after agreeing to a procedure which expressly granted petitioner the right to seek modification of the

order, the DER unreasonably subjected petitioner to an enforcement action which could well be moot upon resolution of the pending modification proceedings before the EHB.

Due process requires that a state, once it permits appellate review, must provide open and equal access to the appellate process. *In Re Brown*, 439 F.2d 47 (3rd Cir. 1971); *Robinson v. Beto*, 426 F.2d 797 (5th Cir. 1970). In this case, the state granted access to appellate review in its agreement with petitioner, but ignored that agreement when it filed an enforcement action during the pendency of petitioner's appeal. Having agreed that an appeal could be taken, the state cannot constitutionally impede petitioner's open and equal access to the appellate courts by simultaneously prosecuting an action to enforce the terms of the very order which expressly permits the appeal taken.

CONCLUSION

Petitioner submits that the subjection of petitioner to simultaneous state court proceedings to enforce an administrative order at the very time that proceedings to modify the order are pending in the administrative process, in accordance with the order's express terms, violates petitioner's Fourteenth Amendment right to due process of law when enforcement of the unmodified order will require petitioner to take costly and irrevocable action which could be rendered moot by modification of the order in the administrative process.

Respectfully submitted,

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SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES
V.
BETHLEHEM STEEL CORPORATION,
Appellant

No. 5
May Term, 1977

ORDER

AND Now, this 24th day of November, 1976, it is ordered as follows:

..X.. Order Affirmed.

..... Order Reversed.

..... Order Vacated and lower court directed to proceed in accordance with opinion filed herewith.

..... Order Modified as set forth in opinion filed herewith.

..... Ordered as set forth in opinion filed herewith.

BY THE COURT:

./s/.....
Deputy Prothonotary

NOTE: Unless another date is hereinafter set forth, the foregoing order was entered on the docket on the date set forth above.

Order entered: .....

IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES

V.

BETHLEHEM STEEL CORPORATION,

Appellant

No. 5
May Term, 1977

Appeal from an Order of the Commonwealth Court at No. 1054 C.D. 1975 on original jurisdiction.

OPINION OF THE COURT

Filed: November 24, 1976

ROBERTS, *J.*

This is an appeal from an order of the Commonwealth Court overruling preliminary objections of the Bethlehem Steel Corporation (Bethlehem) to the petition of the Department of Environmental Resources (DER) seeking enforcement of a consent order.[1] The order provides that, in certain circumstances, Bethlehem may apply to DER for modification, and that any action taken on such an application can be appealed to the Environmental Hearing Board (EHB) and the courts. The question before us today is whether the Commonwealth Court has jurisdiction to entertain an action for enforcement of the consent order during the pendency of an appeal from DER's decision to

[1] *Commonwealth of Pennsylvania, Department of Environmental Resources v. Bethlehem Steel Corporation*, ___ Pa. Commonwealth Ct. ___, 352 A.2d 563 (1976).

deny an application for modification.[2] We conclude that it does, and affirm.

[2] This Court has jurisdiction pursuant to the Act of March 5, 1925, P.L. 23, §1, 12 P.S. §672 (1962), which provides for appeal from preliminary determinations on questions of jurisdiction as if those determinations were final judgments.

DER brought this action pursuant to section 10(a) of the Air Pollution Control Act, Act of October 26, 1972, P.L. 989, §10, 35 P.S. §4010(a) (Supp. 1976), which confers jurisdiction on the Commonwealth Court for enforcement of orders "from which no timely appeal has been taken or which has been sustained on appeal." Bethlehem contends that section 10(a) does not confer jurisdiction to enforce this order during the pendency of its appeal of DER's rejection of its application for modification.

In support of its claim that the Commonwealth Court does not have jurisdiction, Bethlehem advances arguments based on the doctrines of primary jurisdiction, exhaustion of administrative remedies, and ripeness for review.

These questions may not be jurisdictional in the strictest sense; they involve issues the courts may have power to decide, but refrain from deciding until after the agency has had an opportunity to take action on the matter. See 3 K. Davis, Administrative Law Treatise §19.01 (1958) (primary jurisdiction) [hereinafter cited as Davis]. "Court jurisdiction is not thereby ousted, but only postponed." *United States v. Philadelphia National Bank*, 374 U.S. 321, 353, 83 S. Ct. 1715, 1717 (1963) (primary jurisdiction); cf. 3 Davis, supra at 2 n.7 (when the doctrine of exhaustion of administrative remedies applies "judicial interference is withheld until the administrative process has run its course.").

On the other hand, these doctrines do relate to the relative competency of the courts and administrative agencies to make an initial determination, and relate to whether the court will reach the merits of the case. See *Studio Theaters, Inc. v. Washington*, 418 Pa. 73, 209 A.2d 802 (1965).

We need not determine whether these doctrines are questions of jurisdiction within the meaning of 12 P.S. §672 (1962). Bethlehem contends that these doctrines apply because of the possibility that the order will be modified as a result of the appeals pending before the EHB. As such, Bethlehem's arguments that jurisdiction should be withheld pending further administrative action essentially amount to an argument that the order should not be treated as final, i.e., not one "from which no timely appeal has been taken" within the meaning of section 10(a) of the Air

(continued)

I.

The consent order is an air pollution abatement order agreed to by DER and Bethlehem, after extensive negotiations, on February 25, 1972. DER approved air pollution abatement plans submitted by Bethlehem to implement the order. These plans required Bethlehem to cease operation of its Franklin Coke Oven Battery No. 17 at its Johnstown Plant by May 31, 1975. Bethlehem also was required to submit an application for a permit to construct equipment to control emissions at Coke Oven Battery No. 5 at its Bethlehem Plant by March 1, 1975.

By the terms of the consent order, Bethlehem is entitled to apply for modification of the order or the modification plans in certain circumstances. If DER rejects the application for modification, Bethlehem may appeal to the EHB and the courts.[3] On September 17, 1973, Bethlehem applied for an extension of time to continue operating Franklin Coke

Pollution Control Act. Thus the doctrines of primary jurisdiction, exhaustion and ripeness as presented in this case, cannot be separate from the question of the applicability of section 10(a) of the Air Pollution Control Act.

[3] Paragraph 9 of the order reads:

> "9. Upon application of Bethlehem Steel Corporation the provisions of this order, and plans and schedules submitted and approved hereunder, may be modified by the Department, when
>
> A. delivery or installation of equipment is delayed by events not in the control of Bethlehem Steel Corporation;
>
> B. revision of the plans and schedules submitted or approved is necessary to incorporate changes in technology or corporate planning to achieve within the time specified in paragraph 5 hereof, significant improvement in air pollution control; or
>
> C. air pollution control standards applicable to the by-product, slot-type coke ovens are changed.
>
> Any order, decision or other action taken by the Department upon such application may be appealed to the Environmental Hearing Board and the courts of the Commonwealth as provided by law."

Oven Battery No. 17 at its Johnstown Plant beyond the scheduled termination date. DER denied this application on February 18, 1975, and Bethlehem appealed to the EHB.

In the meantime, Bethlehem adopted a change in corporate planning which called for continued operation of the Franklin Coke Oven Batteries, and efforts were made to negotiate a resolution of the differences between Bethlehem and DER. Bethlehem also applied for an extension of time for compliance with the plans relating to Coke Oven Battery No. 5 at its Bethlehem Plant. DER denied this application on March 6, 1975.

On May 15, 1975, after further negotiations, Bethlehem submitted to DER proposed modifications of the original abatement plans applicable to both the Coke Oven Battery No. 5 at its Bethlehem Plant and to the Franklin Coke Oven Battery No. 17 at its Johnstown Plant. As this application superseded its earlier application, Bethlehem stipulated to dismissal of the earlier appeal pending before the EHB. On June 16, 1975, DER denied Bethlehem's latest requests for modification, and Bethlehem's appeal to the EHB from this denial is still pending.

Finally, on July 25, 1975, DER filed a petition to enforce the consent order in the Commonwealth Court. Bethlehem filed preliminary objections, raising jurisdictional questions, which were overruled by the Commonwealth Court.

II.

A. DER's petition to enforce the order was brought pursuant to section 10(a) of the Air Pollution Control Act.[4] This section authorizes petition to enforce a DER order "from which no timely appeal has been taken or which has

[4] 35 P.S. §4010(a) (Supp. 1976).

been sustained on appeal."[5] Since the order DER seeks to enforce was reached by consent of the parties it is an order "from which no timely appeal has been taken" and therefore is enforceable in the Commonwealth Court.

Bethlehem insists that the order cannot be enforced in the Commonwealth Court pending the outcome of its appeal of DER's denial of its application to modify the order. But it is the DER decision not to modify the order, rather than the order itself, which Bethlehem has appealed to the EHB. The original air pollution abatement order remains in effect, and is still an order from which no timely appeal has been taken. Therefore, DER can still bring an action to enforce the original order pursuant to section 10(a) of the Air Pollution Control Act.

B. Looking only at the language of section 10(a), it might be argued that an appeal from a decision denying modification of an order is an appeal from the order itself, so as to deprive the Commonwealth Court of jurisdiction. Such an interpretation, however, would be totally inconsistent with the purpose of section 10(a).[6]

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[5]Section 10(a) provides:

> "The Attorney General, at the request of the department, may initiate, by petition, in the Commonwealth Court or the court of common pleas of the county in which the defendant resides or has its place of business, an action for the enforcement of any order issued pursuant to this act by the department from which no timely appeal has been taken or which has been sustained on appeal. The court, in such proceeding, shall have the power to grant such temporary relief as it deems just and proper and if, after hearing, the court finds that such order has not been fully complied with, the court shall enforce such order by requiring immediate and full compliance therewith. The Commonwealth shall not be required to furnish bond or other security in any proceeding instituted under this subsection."

[6]The purpose of all statutory interpretation is to give effect to the intent of the Legislature. Where the words of a statute are not free from ambiguity they are interpreted in light of the overall purpose of the statute. Act of November 25, 1970, P.L. 1339, §3, 1 P.S. §1921 (Supp. 1976); see *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812 (1974).

Section 10(a) of the Air Pollution Control Act must be construed in accordance with the purposes of the Act.[7] The Act's purposes include the "protection of public health, safety and well-being of [the] citizens . . . ."[8] This declaration of policy, adopted in 1968, replaced an earlier declaration that air resources be maintained within the limits of technological feasibility and economic reasonableness.[9] This change

> ". . . disclos[es] a market shift from combating air pollution within limitations of technical feasibility and economic reasonableness to protection not only of the air resource itself, but also of the public health, property and recreational resources of the Commonwealth."

Rushton Mining Co. v. Commonwealth, 16 Pa. Commonwealth Ct. 135, 140, 328 A.2d 185, 188 (1974).

We conclude that the adoption of the Air Pollution Control Act makes the preservation of the quality of our air resources a matter of the highest public importance.[10]

In keeping with this policy, the Legislature adopted procedures to facilitate enforceability of the Act. A variety of means of enforcement are provided, including the enforcement of administrative orders, direct proceedings in court for injunctive relief or civil penalties, and action brought by district attorneys or members of the general public.[11] Emergency enforcement powers are also granted.[12] Moreover, the Legislature restricted the

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[7]35 P.S. §§4001 et seq. (Supp. 1976).

[8]35 P.S. §4002 (Supp. 1976).

[9]Act of June 12, 1968, P.L. 163, No. 92, §1, amending Act of January 8, 1960, P.L. (1959) 2119, §2, 35 P.S. §4002 (Supp. 1976).

[10]This policy also stems from the Pennsylvania Constitution: "The people have a right to clean air . . . ." Pa. Const. art I, §27 (Supp. 1976).

[11]35 P.S. §4008-10 (Supp. 1976).

[12]Id. §4006.2 (Supp. 1976).

availability of supersedeas during administrative appeals from DER orders.[13]

C. Section 10(a) of the Air Pollution Control Act should also be interpreted in light of the statutory scheme created by the United States Congress in the Clean Air Act Amendments of 1970.[14] These amendments require the Environmental Protection Agency (EPA) to set national air quality standards.[15] The states are then required to submit plans for the implementation of these standards. These plans must be approved by the EPA if they meet eight general criteria set out in the statute. The principal criterion for federal approval is that the state plan ensure that primary air quality standards set by the EPA to protect the public health will be satisfied within three years.[16] In summary, the Clean Air Act Amendments of 1970 create a legislative scheme by which:

> "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . ."[17]

[13]Act of December 3, 1970, P.L. 834, §20(d), 71 P.S. §510-21(d) (Supp. 1976), provides:

> "An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the board shall have power to grant a supersedeas."

This section, by limiting the availability of supersedeas, reflects a policy in favor of the enforceability of DER orders. Yet this section applies only to orders which are not yet final. Although such orders are enforceable, see 35 P.S. §§4008-09, they are not subject to the provisions of section 10(a) of the Air Pollution Control Act. Clearly, an even stronger policy in favor of enforceability applies once an order becomes final.

[14]42 U.S.C.A. §§1857 et seq. (Supp. 1976).

[15]42 U.S.C.A. §1857c-4 (Supp. 1976).

[16]42 U.S.C.A. §1857c-5 (Supp. 1976). The Pennsylvania State Implementation Plan was approved in July, 1972. See 40 C.F.R. §§52.2020 et seq.

[17]42 U.S.C.A. §1857c-2(a) (Supp. 1976).

Pennsylvania's Air Pollution Control Act provides the mechanism by which the State meets its responsibilities under the Clean Air Act Amendments of 1970. Section 10(a) of the Air Pollution Control Act, provides a means for enforcing the State Implementation Plan. Thus, section 10(a) of the Act, supra, should be interpreted in accordance with the policies underlying the Clean Air Act Amendments of 1970.

Like the Pennsylvania Air Pollution Control Act, the Clean Air Act Amendments of 1970 reflect a legislative determination that air pollution constitutes a serious threat to public health and safety, and that maintaining clean air is a matter of the highest priority:

> "[T]he 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution."

Union Electric Co. v. EPA, ___ U.S. ___, ___, 96 S. Ct. 2518, 2525 (1976). The importance of achieving air quality standards is reflected by the expedited timetable set for EPA and state compliance[18] and by Congress' determination that achieving air quality standards should take priority over economic and technical considerations. As the Supreme Court recently explained:

> "Section 110(a)(2)(A)'s three-year deadline for achieving primary air quality standards is central to the Amendments' regulatory scheme and, as both the language and the legislative history of the requirement make clear, it leaves no room for claims of technological or economic infeasibility."

[18]EPA was required to set air quality standards within 90 days. 42 U.S.C.A. §1857c-4 (Supp. 1976). State plans for implementation of these standards were to be submitted within nine months after the air quality standards were set, and approved by the EPA within four months after submission. 42 U.S.C.A. §1857c-5 (Supp. 1976). Among the requirements for State implementation plans was that they meet primary air quality standards within three years. 42 U.S.C.A. §1857c-5(a)(2)(A).

Id. at ___. 96 S. Ct. at 2526.[19]

Like the Pennsylvania Air Pollution Control Act, the Clean Air Act Amendments of 1970 provide for a variety of enforcement mechanisms. The primary mechanism for enforcement of the Clean Air Act is the enforcement of implementation plans by the states. In addition EPA can issue compliance orders, the violation of which carries severe monetary penalties, and bring actions for injunctive relief.[20] Citizen suits to enforce emission limitations are also encouraged.[21]

Thus, the Clean Air Act, like the Pennsylvania Air Pollution Control Act, dictates a policy in favor of the enforceability of air pollution abatement orders. We will not adopt an interpretation of section 10(a) which is not required by its language and which would deprive the courts of jurisdiction to enforce pollution abatement orders.[22] The health and safety of the public must take priority.

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[19]The Supreme Court's interpretation of the Clean Air Act Amendments of 1970 was based, in part, on a Senate Committee report that determined that public health is more important than questions of technological feasibility:

> "'Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down . . . .' S. Rep. No. 1196, 91st Cong., 2d Sess., 2-3 (1970)."

___ U.S. at ___, 96 S. Ct. at 2526.

[20]42 U.S.C.A. §1857c-8 (Supp. 1976).

[21]42 U.S.C.A. §1857h-2 (Supp. 1976).

[22]In *Train v. Natural Resources Defense Counsel, Inc.*, ___ U.S. ___, 95 S. Ct. 1470 (1975), the Georgia State Implementation Plan was challenged because it included a variance procedure. It was argued that the variance procedure would invite litigation and thereby delay achievement of air quality standards. While the Court recognized that the procedure would invite variance applications, and that polluters would seek judicial review if their applications were denied, the Court noted:

> "This litigation, however, is carried out on the polluter's time, not the public's, for during its pendency the original regulations remain in effect, and the polluter's failure to comply may subject him to a variety of enforcement of procedures."

(continued)

D. We conclude, therefore, that the policies behind both state and federal law compel the interpretation of section 10(a) of the Pennsylvania Air Pollution Control Act suggested by a literal reading of its terms. The consent order in this Court is one "from which no timely appeal has been taken," and therefore an enforcement action may be brought in the Commonwealth Court pursuant to section 10(a). Section 10(a) provides no exception for cases where a party is seeking modification of an order and the policies expressed in both state and federal law prevent us from writing any such exception into the statute.

Bethlehem may ultimately prevail in its efforts to have the order modified, and thus could be subject to unnecessary expense if the present order is enforced. This possibility, however, would not justify the conclusion that the courts are without jurisdiction to enforce the order. Such a conclusion would leave the courts powerless to enforce the order — even where it is highly unlikely that the order will be modified and where continued pollution in violation of the order presents a serious danger to the public.[23] In effect, the mere application for an extension would operate as a stay; an applicant could continue to pollute for the period required to appeal to the EHB and the courts. Such a result would be totally at odds with the strong legislative policy expressed in both the Air Pollution Control Act and the Clean Air Act. The modification proceedings must be carried out on the polluter's time, not at the expense of the general public.[24]

Id. at ___, 95 S. Ct. at 1488.

Similarly, we believe that DER orders must remain enforceable during the pendency of modification proceedings in order to comply with the spirit of the Clean Air Act Amendments of 1970. We should not adopt a system by which litigation could be used as a tool to delay enforcement of air quality standards.

[23]Where, as here, DER has reviewed and rejected the application, it cannot be assumed that the applicant will prevail on appeal.

[24]See note 22, supra.

III.

A. In addition to its argument that section 10(a) does not apply when modification proceedings are pending, Bethlehem contends that the doctrine of election of remedies foreclose DER from invoking the jurisdiction of the Commonwealth Court. Bethlehem does not raise an election of remedies argument in the strict sense.[25] Rather, Bethlehem appears to be arguing that the order, by its terms, precludes enforcement pending the outcome of modification proceedings.[26] Bethlehem contends that by agreeing to that portion of the consent order which allows it to apply for modification, DER agreed not to enforce the order until its decisions on modification has been upheld on appeal.

We do not interpret the consent order to foreclose enforcement pending the outcome of modification proceedings. Paragraph 9 of the order only provides that the order "may be modified" by the DER, and preserves the right to appeal from its decision. It does not provide that enforcement will be stayed pending any appeals from the DER's decision. It is apparent that the purpose of this paragraph is to ensure that DER will consider Bethlehem's application, and to allow Bethlehem to appeal DER's

[25] In *Department of Environmental Resources v. Leechburg Mining Co.*, 9 Pa. Commonwealth Ct. 297, 305 A.2d 764 (1973), DER brought a claim based on a consent order along with separate claims based on the underlying violations which led the DER to seek the original order. The court limited DER to enforcement of the consent order. Assuming that the Commonwealth Court's decision can be squared with the provision in the Air Control Act that "the existence of or exercise of any remedy shall not prevent the department from exercising any other remedy . . . ." 35 P.S. §4010(c) (Supp. 1976), it does not bar this action. DER here only seeks to enforce the consent order; separate claims are not involved. See *Department of Environmental Resources v. Leechburg Mining Co.*, supra.

[26] We have some doubt whether this argument raises a question of jurisdiction. Since it might have some bearing on our interpretation of section 10(a), however, we will consider Bethlehem's argument. See note 2, supra.

decision. The paragraph was included to escape the general rule that an administrative agency's denial of a motion to reopen is not subject to judicial review, see *SEC v. Louisiana Public Service Commission*, 353 U.S. 368, 77 S. Ct. 855 (1957); *Martin Marietta Corp. v. FTC*, 376 F.2d 430 (7th Cir. 1967), not as a limitation on the DER's enforcement power. This Court is most hesitant to construe any agreement as a limitation on the DER's enforcement powers, and, in the absence of clear and specific language to the contrary, will not do so here.[27]

B. Finally, Bethlehem contends the doctrine of primary jurisdiction prevents DER from maintaining this action.[28]

[27] *Winn-Dixie Stores, Inc. v. FTC*, 377 F. Supp. 773 (M.D. Fla. 1974), is in no way inconsistent with our decision. That action was brought by Winn-Dixie to compel the FTC to modify its order. The court enjoined enforcement of the order only after it determined that Winn-Dixie was entitled to modification. The court ordered the FTC to reopen its proceedings and modify the order; thus the order could not be enforced because it was no longer valid.

The action in *Winn-Dixie* would be equivalent to a motion by Bethlehem after modification of the consent order by the EHB, to change the Commonwealth Court's enforcement decree in order to reflect the modification. See note 32 infra. Thus *Winn-Dixie* has no bearing on the enforceability of an order which is still valid.

[28] If applicable, this doctrine could effect our interpretation of section 10(a). See note 2, supra.

Bethlehem also makes arguments based on the doctrines of ripeness and exhaustion of administrative remedies. Neither doctrine is applicable here.

Under the ripeness doctrine courts will not intervene when administrative action is abstract, hypothetical, or remote. Davis, §21.01, supra. This is an enforcement action and, unless enforcement is granted, Bethlehem intends to continue operation of its Johnstown and Bethlehem plants in a manner contrary to the terms of the order DER seeks to enforce. Here the administrative action, and the possible harm to Bethlehem, is immediate and concrete.

Similarly, the doctrine of exhaustion of administrative remedies has no bearing here. When this doctrine applies, a party must pursue the administrative remedies he has against an agency before challenging its action in court. L. Jaffe, Judicial Control of Administrative Action 424 (1965). Here it is an administrative agency which is invoking the jurisdiction of the court, not a party seeking review of administrative action.

Primary jurisdiction is a flexible doctrine, designed to coordinate the work of agencies and courts; Davis. §19.01, supra at 5; L. Jaffe, Judicial Control of Administration Action 121 (1965).

> "The precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court."

Davis, supra at 3. The doctrine reflects a principle:

> ". . . that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created . . . for regulating the subject matter should not be passed over."

Far East Conference v. United States, 342 U.S. 570, 574, 72 S. Ct. 492, 494 (1952). In such cases, the initial determination is left to the administrative agency both because its decision is necessary for the "protection of the integrity of the regulatory scheme." *United States v. Philadelphia National Bank*, 374 U.S. 321, 353, 83 S. Ct. 1715, 1736 (1963), and may be of "material aid" to the courts, *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 305, 93 S. Ct. 573, 582 (1973).

The doctrine of primary jurisdiction has no application here. DER, the agency with primary responsibility for enforcing the Air Pollution Control Act, is not being bypassed. Indeed, DER is the party bringing the action. Having obtained a consent order, DER has decided that enforcement is necessary. Under section 10(a) of the Act, the court's duty is to determine whether there has been compliance with the order. This duty is well within the

conventional experience of judges, and enhances, rather than interferes with, the integrity of the regulatory scheme.[29]

Bethlehem insists that the doctrine of primary jurisdiction prevents the Commonwealth Court from proceeding until the EHB has acted on its application for modification. The consent order remains valid, however, and failure to comply is unlawful.[30] Even if the proceedings before the EHB involved a timely appeal from the consent order itself, rather than an appeal from an application for modification, Bethlehem would be expected to comply with the order.[31]

This is an enforcement proceeding, based on the original consent order, not a proceeding to determine Bethlehem's right to modification. Thus, the Commonwealth Court is not being called upon to make a decision which should be decided initially by an administrative agency. Nor will enforcement decree impair the integrity of the regulatory process. A judicial determination that Bethlehem presently is not in compliance with the consent order in no way interferes with the power of the EHB or the courts to modify the order at some future date.[32] There is no

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[29] Provisions which enable DER to obtain injunctive relief and civil penalties without first obtaining an administrative order, and which allow suits by district attorneys and members of the general public, make clear the inapplicability of the doctrine of primary jurisdiction. See, 35 P.S. §§4010(b), 4010(d), 4010(f) (Supp. 1976).

[30] 35 P.S. §4008 (Supp. 1976).

[31] See note 13, supra.

[32] The Commonwealth Court believed that a possible conflict could arise if it directed enforcement in accord with the original terms of the order and the order was subsequently modified by the EHB. The court suggested that modification of the original order could serve as a defense in any contempt proceeding. ___ Pa. Commonwealth Ct. at ___, n.4, 352 A.2d 565 n.4. No such conflict need arise, however, as the Commonwealth Court can frame its enforcement decree so as to take into account the possibility that the consent order may be modified. Assuming the court fails to do so, the better course would be to seek modification of its decree, rather than risk a contempt citation. See *Mayer & Sons v. Department of Environmental Resources*, 18 Pa. Commonwealth Ct. 85, 334 A.2d 313 (1975) (grounds which might require modification of enforcement decree no defense to contempt proceeding).

reason to stay judicial enforcement pending the decision of the EHB.

In summary, the doctrine of primary jurisdiction, and the policies underlying it, do not justify a conclusion that section 10(a) of the Air Pollution Control Act is inapplicable during the pendency of modification proceedings.

Based on the clear language of section 10(a) of the Air Pollution Control Act, and the strong legislative policy in favor of effective enforcement of air pollution control standards, we hold that the Commonwealth Court has jurisdiction over this action.

Order affirmed.

MR. JUSTICE NIX did not participate in the consideration or decision of this case.

D.E.R. v. BETHLEHEM STEEL CO., et al.
[23 Commonwealth Ct. 387, (1976).]

SYLLABUS—STATEMENT OF THE CASE.

Commonwealth of Pennsylvania, Department of Environmental Resources, Petitioner v. Bethlehem Steel Corporation & Lewis W. Foy, Chairman, Bethlehem Steel Corporation; & Thomas N. Crowley, General Manager Johnstown Plant, Bethlehem Steel Corporation; & Harold F. Miller, General Manager, Bethlehem Plant, Bethlehem Steel Corporation, Respondents.

Environmental law—Consent order—Air Pollution Control Act, Act 1960, January 8, P.L. (1959) 2119—Application to modify order—Election of remedies—Enforcement of administrative order.

1. A petition by the Department of Environmental Resources under the Air Pollution Control Act, Act 1960, January 8, P.L. (1959) 2119, to enforce an order to which all parties had agreed but with which there was no compliance within the time prescribed, is not premature or otherwise improper because the party not in compliance filed an application for modification of the order. [388-9]

2. Once the Department of Environmental Resources exhausts administrative procedures available against a polluter and has obtained an administrative consent order, it may utilized the courts to enforce the order when there is no compliance therewith. [389-90]

Submitted on briefs October 20, 1975, to President Judge BOWMAN and Judges CRUMLISH, JR., KRAMER, WILKINSON, JR., MENCER, ROGERS and BLATT.

Original jurisdiction, No. 1054 C.D. 1975, in case of Commonwealth of Pennsylvania, Department of Environmental Resources, Petitioner v. Bethlehem Steel

Corporation, Respondent. Petition for enforcement of administrative order filed in the Commonwealth Court of Pennsylvania. Respondent filed preliminary objections. Held: Preliminary objections overruled.

Robert E. Yuhnke, Assistant Attorney General, for petitioner.

Paul A Manion, with him *Robert M. Walter, Robert W. Watson, Jr.*, and *Reed Smith Shaw & McClay*, for respondent.

OPINION OF THE COURT

Opinion by Judge Mencer, February 18, 1976:

This case is before us on the preliminary objections of Bethlehem Steel Corporation (Bethlehem) to the petition of the Department of Environmental Resources (DER) seeking enforcement of Air Pollution Abatement Order No. 72-533 (order) which resulted from a consensual agreement executed on February 25, 1972 by Bethlehem and DER. The order provides, among other things, that Bethlehem submit an application for a permit to construct equipment to control emissions of air contaminants resulting from the pushing operation at Coke Oven Battery No. 5 at its Bethlehem, Pennsylvania, plant by March 1, 1975 and that Franklin Coke Oven Battery No. 17 at Bethlehem's Johnstown, Pennsylvania, plant cease operation by May 31, 1975. Paragraph 9[1] of that same order provides that Bethlehem may seek

1. Paragraph 9 of the order reads:

> "9. Upon application of Bethlehem Steel Corporation the provisions of this order, and plans and schedules submitted and approved hereunder, may be modified by the Department, when
>
> A. delivery or installation of equipment is delayed by events not in the control of Bethlehem Steel Corporation;
>
> B. revision of the plans and schedules submitted or approved is necessary to incorporate changes in technology or

(continued)

modification of the order under certain circumstances. An application for modification of the order is now on appeal to the Environmental Hearing Board (EHB).

Bethlehem raises a question of the jurisdiction of this Court, issues of primary jurisdiction, exhaustion of administrative remedies, and ripeness for review and also pleads a demurrer. All these preliminary objections concern the effect of the pending action for modification before the EHB on a petition to enforce the order of February 25, 1972. Bethlehem urges, in effect, that by the terms of paragraph 9 an application for modification acts as a supersedeas in any action by DER to enforce the original order. We do not agree.

Bethlehem fails to recognize in its arguments that the action to enforce the order to which it agreed and the application for modification before the EHB, though based to some extent on the same factual material, are procedurally distinct.

Section 10(a) of the Air Pollution Control Act[2] authorizes petitions to enforce orders from which no timely appeal has been taken or which have been sustained on appeal. Bethlehem contends that its appeal on the modification application is in reality an appeal from the original order. If this were true, an action for enforcement would be premature. However, it is clear that Section 10(a) con-

> corporate planning to achieve within the time specified in paragraph 5 hereof, significant improvement in air pollution control; or
>
> C. air pollution control standards applicable to the by-product, slot-type coke ovens are changed.
>
> "Any order, decision or other action taken by the Department upon such application may be appealed to the Environmental Hearing Board and the courts of the Commonwealth as provided by law."

2. Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §4010(a).

templates by its very nature appeals from an adversary proceeding, not from a consensual agreement. Here the parties *agreed* to be legally bound, and no appeal *from the consent order* was contemplated. The order was final and binding the moment it was executed. When the time for performance had run, DER could properly petition for enforcement.[3]

We next address Bethlehem's contention that DER must elect to pursue its action either in the courts or through the administrative process. Bethlehem asserts that our decision in *Department of Environmental Resources v. Leechburg Mining Co.*, 9 Pa. Commonwealth Ct. 297, 305 A.2d 764 (1973), requiring DER to proceed against alleged polluters initially either by injunction or alternatively through the administrative process is applicable to oust this Court of jurisdiction. This argument again mistakenly assumes that the hearing on Bethlehem's modification petition is an administrative procedure to enforce the original order. In the case at bar, DER had already exhausted the administrative procedure when it obtained a consent order. As a final step along that same route, DER is seeking enforcement by this Court. This is entirely proper. The fact that the administrative process yielded a consent order rather than an adjudication by the EHB does not affect DER's ability to seek enforcement.

Properly interpreted, *Leechburg*, in fact, supports the position of DER. In *Leechburg*, preliminary objections were sustained by applying the doctrine of election of remedies on all counts *except one brought by DER to enforce a consent adjudication*. We hold that by consenting to be bound by the order of February 25, 1972, Bethlehem agreed

3. *See Commonwealth v. United States Steel Corp.*, 15 Pa. Commonwealth Ct. 184, 325 A.2d 324 (1974); *Commonwealth v. Rozman*, 10 Pa. Commonwealth Ct. 133, 309 A.2d 197 (1973).

that it would take the required actions by the deadlines imposed unless the order were modified prior to that time. Bethlehem had, and still has, a right to appeal an adverse ruling on its petition for modification, first to the EHB and subsequently to this Court. During appeals from such ruling, however, the unmodified agreement remains in force. Since the deadlines for compliance have passed and Bethlehem has not taken the action which it agreed to take, the inception of an action for enforcement is timely and proper.[4] We therefore enter the following

Order

Now, this 18th day of February, 1976, the preliminary objections of the Bethlehem Steel Corporation in the above captioned matter are overruled, and Bethlehem Steel Corporation is allowed 20 days from this date within which to file an answer to the petition of the Department of Environmental Resources.

4. We recognize that the terms of the order, which allow Bethlehem to apply to DER for modification of the order with a right to appeal any action taken on such an application to the Environmental Hearing Board (EHB), create an unusual situation. A potential conflict could arise if the court directs enforcement in accord with the original terms of the order but prior to compliance by Bethlehem the EHB modifies those terms. If such a conflict would arise, we would consider the modification to be a proper defense to a contempt proceeding brought for non-compliance with the order entered relative to the petition for enforcement.

Appendix C

SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

SALLY MRVOS
Prothonotary
J. HANIEL HENRY
Deputy Prothonotary

P. O. Box 624
Harrisburg 17108

January 6, 1976

Paul A. Manion, Esquire
P. O. Box 2009
Pittsburgh, Pa. 15230

Re: Commonwealth, Department of Environmental Resources v. Bethlehem Steel Corporation, Appellant
No. 5, May Term, 1977

Dear Mr. Manion:

This is to advise that the following Order has been endorsed on the Application for Reargument filed in the above matter:

"January 3, 1977

Petition denied.

s/ Per Curiam"

Very truly yours,

/s/
Deputy Prothonotary

cc: Robert E. Yuhnke, Esq.
cc: West Publishing Company
September 21, 1976 - ARGUED - J.278
November 24, 1976 - DECISION

UNITED STATES CONSTITUTION, Amend. 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AIR POLLUTION CONTROL ACT

§10(a) The Attorney General, at the request of the department, may initiate, by petition, in the Commonwealth Court or the court of common pleas of the county in which the defendant resides or has its place of business, an action for the enforcement of any order issued pursuant to this act by the department from which no timely appeal has been taken or which has been sustained on appeal. The court, in such proceeding, shall have the power to grant such temporary relief as it deems just and proper and if, after hearing, the court finds that such order has not been fully complied with, the court shall enforce such order by requiring immediate and full compliance therewith. The Commonwealth shall not be required to furnish bond or other security in any proceeding instituted under this subsection.

CERTIFICATE OF SERVICE

I, Paul A. Manion, in accordance with Rule 33(1) of the Rules of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari to the Supreme Court of Pennsylvania on all parties required to be served by mailing three copies thereof to Robert E. Yunke, Esq., Assistant Attorney General, Department of Environmental Resources, Room 505, Executive House Apartments, 101 South Second Street, Harrisburg, Pennsylvania 17120, Attorney for Respondent, by first class mail, postage prepaid, this 28th day of January, 1977.

/s/ PAUL A. MANION